Desegregation, Discrimination and Democracy: *Parents Involved*'s Disregard for Process

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"If we have to decide the question, then representative government has failed."[1]

This Supreme Court's decision to strike down Seattle's and Louisville's voluntary desegregation plans is significant not only for public education but also for American democracy. *Parents Involved in Community Schools v. Seattle School District, No. 1*[2] will undoubtedly make the already formidable challenge of promoting racially integrated learning environments even more daunting. Less obvious, but perhaps ultimately more important, are *Parents Involved*'s implications for democratic governance and the role of the federal courts in sustaining and constraining it. As someone whose main focus is election law rather than education law, I focus here on what the decision says—and, more to the point, what it does not say—about democracy.

Parents Involved overrules decisions of democratically elected school boards, made after years of trial-and-error experience in trying to integrate public schools. Yet missing from the majority Justices' opinions is a persuasive justification for the federal judiciary's substitution of its own judgment regarding the costs and benefits of race-conscious integration programs for those made by fairly elected local school boards. This omission betrays a deeper failure of the Rehnquist and now the Roberts Court to develop a functional theory of the role of the federal judiciary in democratic self-government, one that takes into account the circumstances under which political institutions can and cannot be trusted. The Court's rejection of

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[1] Justice Robert A. Jackson, 1953, on *Brown v. Board of Education, in* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 308 (2004) (quoting Justice Robert A. Jackson's papers). *See also* Brad Snyder, *What Would Justice Holmes Do (WWJHD)? Rehnquist's* Plessy *Memo, Majoritarianism, and* Parents Involved, 69 OHIO ST. L.J 873 (2008). I am indebted to Snyder for calling attention to Justice Jackson's quotation, as well as the memo on the desegregation cases by his then-law clerk William Rehnquist (*see infra* note 121), during the symposium.

[2] 127 S. Ct. 2738 (2007).

plans developed by local officials is thus related to the incoherence of the Court's election law jurisprudence, upon which scholars of varying perspectives have remarked.[3]

For those who recall the days when "states' rights" was the rallying cry of the most ardent segregationists, the mere mention of local control over public education is sure to have an unfriendly if not heretical ring to it. So too, those accustomed to seeing federal judges as heroes in the struggle for racial equality may find suspicion of their powers unwelcome. The federal judiciary's aggressive superintendence of the decisions of local school boards was, after all, critical to dismantling de jure segregation in the South and elsewhere. There is, however, an unmistakable difference. *Brown* and the cases that followed did not lightly overrule the educational decisions of democratically elected school boards. These cases instead required the Court to consider whether, in Justice Jackson's words, "representative government ha[d] failed." And failed it most definitely had. At the time that the Court decided *Brown* and for years thereafter, African Americans were largely excluded from elected political bodies at all levels of government, from local school boards to Congress.[4] In fact, they were prevented from voting entirely throughout the South.[5] This massive democratic breakdown justified both the *Brown* decision and the extended federal judicial intervention that was ultimately required to dismantle the regime of de jure segregation.

There is no comparable justification for the Court's second-guessing of the decisions made by elected officials in Louisville and Seattle. In fact, the Court does not even attempt to justify its intervention on anything that might, even in the most generous light, be considered a theory of democracy and the role of federal courts in safeguarding it. To be sure, the Court's decision to strike down these programs finds precedential support in the line of decisions in which the Court has applied heightened scrutiny to race-conscious affirmative action programs, whether motivated by the most noxious racism or a desire to reverse a long history of unequal treatment.[6] But at least since *City of Richmond v. J.A. Croson Co.*,[7] the Court has made no serious attempt to ground its discrimination doctrine in democratic theory. *Parents Involved* extends and exacerbates this omission, failing to consider

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[3] *See* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1065–66 & nn.1–6 (2007) (citing commentary on the Supreme Court's incoherent election law jurisprudence).

[4] *See infra* notes 24–35 and accompanying text.

[5] *See infra* note 24 and accompanying text.

[6] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

[7] 488 U.S. 469, 500 (1989).

whether representative government had failed in Seattle or Louisville, much less to articulate standards under which claims of democratic failure might be evaluated.

This Essay examines the roots and offshoots of this failure. Part I assesses the desegregation cases starting with *Brown*, arguing that the failure of democracy justified the aggressive judicial intervention that was necessary to dismantle segregation in public schools. Part II discusses *Parents Involved* in light of the discrimination precedents on which the majority Justices' opinions are grounded, focusing on the Court's failure to justify its overruling of democratically elected school boards. Part III considers the implications of *Parents Involved* for democracy, suggesting that the future of progressive reform for those concerned with educational equality lies not with the federal judiciary but with the political branches of federal, state, and local governments.

I. DESEGREGATION

The first part of my argument is that the exclusion of African Americans from electoral politics was a critical component of the justification for the line of desegregation cases starting with *Brown*. A premise of this argument is that federal courts should take a functional and institutional perspective in determining whether to override decisions made by democratically elected bodies such as school boards.[8] Specifically, they should consider whether there are reasons to distrust the process by which governmental bodies make their decisions, either because certain groups have been excluded from it or because that process has been distorted by prejudice or some other systemic unfairness.

My argument thus draws upon the process-based theory of constitutional adjudication most famously stated in Footnote Four of *Carolene Products*[9] and, just as famously, developed and defended in John Hart Ely's classic *Democracy and Distrust*.[10] The basic idea is that there are compelling reasons to distrust the products of the political process, and therefore for courts to intervene on constitutional grounds, in two types of

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[8] *See* Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 41 (2004) (viewing "constitutional oversight of democratic politics as a functional problem in institutional design").

[9] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) [hereinafter Footnote Four].

[10] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

circumstances.[11] One is when certain groups are excluded from elections or governance. This idea is described in the second paragraph of Footnote Four, which refers to restrictions on "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[12] Where access to the political process is not open to all, there may be grounds for judicial intervention. The other circumstance is when certain groups' interests are systematically rejected despite the groups' formal ability to participate. The third paragraph of Footnote Four captures this idea, in its reference to "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes."[13] For Ely, discrimination against African Americans was the classic example in which a breakdown in the democratic process necessitated federal judicial intervention.[14] The widespread exclusion of African Americans from politics in the South, combined with the rampant racial prejudice that prevented Blacks from participating as equals even when they were enfranchised, justified the Court's decision to intervene in *Brown* and its progeny.

This is not the place for an extended defense of the *Carolene Products* theory of constitutional adjudication and its relevance to the desegregation cases, a point that has been more than adequately elaborated by Ely and subsequent commentators.[15] Three qualifications on my reliance on this theory here should, however, be noted.

The first is that I do not claim that defects in the political process are the *only* thing that courts should take into consideration in determining how closely to scrutinize the products of a democratically elected body's decision-making process. Courts need not turn a blind eye to text, original intent, fundamental rights, or other potential bases for interpreting the Constitution. But the countermajoritarian difficulty should be taken seriously. Thus, when courts apply heightened scrutiny, they should provide some justification for why the elected bodies' weighing of costs and benefits is not to be trusted. My claim, then, is not that all other theories must give way to process theory. It is, more modestly, that defects in the political process are among the things that a court should consider in deciding whether to strike down the products of that process.

The second qualification is that my argument does not require

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[11] *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 784 (1991).

[12] 304 U.S. at 152 n.4.

[13] *Id.*

[14] ELY, *supra* note 10, at 135.

[15] *See* Klarman, *supra* note 11, at 768–819.

acceptance of the controversial proposition that political process theory can avoid substantive value judgments.[16] Rather, it concedes that, in assessing whether there is a problem with democratic processes sufficient to warrant judicial intervention, courts must rely on some baseline conception of what a fair political process would look like. This can properly be deemed a substantive judgment about the political process, insofar as it entails a normative conception of democratic politics.

This concession to process theory's critics does not make it difficult to justify *Brown*, or even the later decisions that finally helped make its vision of desegregated public schools a reality. Whatever one's conception of a fair democratic process, there can be no denying that the processes through which segregation was adopted and maintained were grossly unfair. Throughout the South, Blacks were prevented even from participating in electoral politics, from elections to the local school board to the election of members of Congress and the President.[17] Even after African Americans were permitted to vote in large numbers in the former Confederate states after the Voting Rights Act of 1965, their influence was systemically diluted through practices such as at-large elections and gerrymandered boundaries.[18] *Brown* and its progeny are justified by this pervasive breakdown in fair democratic processes—including the outright denial of the vote, as well as its dilution—that persisted for years after the Court declared de facto segregation unconstitutional.[19] Representative democracy had failed, in Justice Jackson's words, and quite dismally. Indeed, the near-total disfranchisement of southern Blacks, from the nineteenth through the second

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[16] For criticism of the idea that process theory can avoid substantive value judgments, see Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980), and Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). For a response, see Klarman, *supra* note 11, at 782–88.

[17] For a thorough discussion of the disfranchisement of African Americans in this period, see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974).

[18] *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 37–38, 55–58 (1999); BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 23–24 (1992); Pamela Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, *in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 122 (Mark E. Rush ed.).

[19] *See* GROFMAN, ET AL., *supra* note 18, at 15, 21–23; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 257–66, 287–94 (2000).

half of the twentieth century, is the *quintessential* breakdown of the democratic process, whatever one's conception of discrimination or democracy.

This leads to the third qualification in my reliance on process-based theory: It depends only on the second paragraph of Footnote Four, and not on the third.[20] One need not accept the idea that "prejudice" warrants heightened scrutiny in order to believe that heightened scrutiny is justified when minorities' access to the political process is denied. At the time that *Brown* was decided and for many years thereafter, there were (to borrow from the second paragraph of Footnote Four) formidable "restrict[ions on] those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation."[21] Starting with the end of Reconstruction and continuing through the enactment of the Voting Rights Act of 1965, southern states maintained a variety of now-familiar devices—including literacy tests, all-White primaries, and poll taxes, not to mention threats of violence for those who even attempted to register—as means of excluding African Americans from the polling place.[22]

There is no doubt that, at the time of *Brown* and for many years thereafter, Blacks were shut out of Southern politics. In fact, White Democrats were remarkably explicit about their motives for erecting barriers to democratic participation. An example is a speech by former North Carolina Governor Charles Aycock, who led the fight for amendments to that state's constitution that were designed to keep Blacks from voting in 1900. After these amendments were enacted into law, he said:

> I am proud of my State, moreover, because there we have solved the negro problem . . . . We have taken him out of politics and have thereby secured good government under any party and laid foundations for the future development of both races. . . .
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> I am inclined to give to you our solution to this problem. It is, first, as far as possible under the Fifteenth Amendment to disfranchise him; after that let him alone, quit writing about him; quit talking about him . . . . Let the negro learn once for all that there is unending separation of the races . . . that they cannot intermingle; let the white man determine that no man shall by act or thought or speech cross this line, and the race problem will be at an

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[20] For a fuller development of this point, see Klarman, *supra* note 11, at 788–819.

[21] 304 U.S. at 152 n.4.

[22] *See* KOUSSER, *supra* note 18, at 25 (listing devices used to keep Blacks from voting); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 302 (2000) ("The white-supremacy purposes of these new [state] constitutions were not disguised.").

end.[23]

North Carolina was the last of the states of the former Confederacy to enact such disenfranchising devices.[24] African Americans, who had been elected to all levels of government in large numbers during and after Reconstruction, were completely shut out.[25] For most of the twentieth century, well after the Supreme Court's decision in *Brown*, these devices remained in place.[26] There is no question that there were intentionally created and practically insurmountable barriers to Blacks' ability to participate in elections and get elected to office, before and after *Brown*.[27] While disfranchising practices were most egregious in the South, Blacks also faced barriers to equal participation and representation elsewhere in the country.[28]

We cannot know for sure whether *Brown* would have been necessary if Blacks had enjoyed access to the ballot and to public office throughout these years, but it is at least possible that it would not have been. As Michael Klarman has described, access to the ballot was helpful in protecting African Americans' interests during and even after the Reconstruction era.[29] Later, after the Great Migration, ballot access helped Blacks protect their interests

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[23] Charles B. Aycock, Speech Before the North Carolina Society, Baltimore (Dec. 18, 1903), *in* THE NORTH CAROLINA EXPERIENCE: AN INTERPRETIVE AND DOCUMENTARY HISTORY 415 (Lindley S. Butler & Alan D. Watson eds., 1984), *quoted in* Brief for Congressional Black Caucus as Amicus Curiae in Support of Appellees, Shaw v. Hunt, 517 U.S. 899 (1996) (Nos. 94-923, 94-924), at 13–14, available at 1995 WL 702802.

[24] *See* Daniel P. Tokaji, *The Story of* Shaw v. Reno*: Representation and Raceblindness*, *in* RACE LAW STORIES 497, 501–04 (2008).

[25] KOUSSER, COLORBLIND INJUSTICE, *supra* note 18, at 16–38; J MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 45–82 (1974); Pildes, *supra* note 22, at 303–04.

[26] KOUSSER, COLORBLIND INJUSTICE, *supra* note 18, at 19, 53–58 (discussing the Supreme Court's complicity in the disenfranchisement of Blacks); Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 10–24 (Bernard Grofman & Chandler Davidson eds., 1992); Pildes *supra* note 22, at 310.

[27] KEYSSAR, *supra* note 19, at 257–68; KOUSSER, COLORBLIND INJUSTICE, *supra* note 18, at 13, 21–24.

[28] KEYSSAR, *supra* note 19, at 236; Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453 (2008).

[29] Klarman, *supra* note 11, at 790.

in northern cities.[30] It is at least conceivable that, in a world where Blacks enjoyed equal voting rights, the massive intrusion into state and local democracy that was required to dismantle de jure segregation would not have been necessary.[31] More importantly, the onerous restrictions on African American voting rights before and after *Brown* certainly made it more difficult to dismantle desegregation.[32] Accordingly, the denial of Blacks' access to the political process justifies the result in *Brown*, even if one entirely rejects *Carolene Products*'s idea that prejudice may distort the political process (and thus justify judicial intervention) even when minority groups have equal access to the political process.[33]

The defects in the democratic process also justify the Court's intervention in later cases like *Green v. County School Board*, in which the Court demanded the "root and branch" dismantling of de jure segregation.[34] A decade after *Brown*, public schools in the states of the old Confederacy remained almost entirely segregated.[35] Given Blacks' almost complete exclusion from polling places throughout this period, it is not difficult to see why. The "massive resistance" among southern Whites was easily sufficient to overcome what little political power Blacks had in this period. It also justifies the Court's more aggressive posture toward southern intransigence, embodied in *Green*.

A focus on defects in the democratic process also helps explain the Court's increasing deference to local school boards, starting in the 1970s.[36] As Blacks gained voting rights in the South, the Court's posture toward the decisions made by democratic institutions became more deferential. Justice

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[30] *Id.* at 795.

[31] *Id.* at 807, 813.

[32] *Id.* at 803–04.

[33] To be clear, my claim is not that the Court in *Brown* and the cases that followed consciously justified their own actions in terms of correcting the political process. It is that, regardless of the Justices' motivations, these cases can be justified on this ground. *See* ELY, *supra* note 10, at 73–75.

[34] 391 U.S. 430, 438 (1968).

[35] KLARMAN, *supra* note 11, at 349; JESSE H. CHOPER ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES 1124 (9th ed. 2001).

[36] *See* Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 640 (2007); Enid Trucious-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race, and Public Schools in Louisville, Kentucky*, 112 PENN ST. L. REV. 947, 969 (2008). For more on the Court's history of deference to local school districts, see Danielle Holley-Walker, *Educating at the Crossroads:* Parents Involved, *No Child Left Behind, and School Choice*, 69 OHIO ST. L.J. 911 (2008).

Breyer's dissent in *Parents Involved* reminds us that *Swann v. Charlotte-Mecklenburg Board of Education* emphasized school authorities' "broad power to formulate and implement educational policy."[37] Three years later, in *Milliken v. Bradley*, this emphasis on local control caused the Court to reject a federal court order requiring interdistrict busing between Detroit and neighboring districts.[38] In rejecting this plan, Chief Justice Burger's opinion for the majority famously remarked that: "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."[39] The *Milliken* majority explicitly worried that district courts would become "a *de facto* 'legislative authority to resolve these complex questions, and then the 'school superintendent' for the entire area," a task that "few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives."[40] As hyperbolic as this remark may be, it expresses the Court's respect for the decisions of local democratic bodies which would remain prominent in subsequent years as the federal courts gradually withdrew from their aggressive superintendence of the public schools.

This is not to say that *Milliken* or other cases upholding local school boards' authority were correctly decided, nor is it to deny that the increasing conservatism of the Burger and then Rehnquist Courts was a key reason for the Court's greater deference to local school boards' decisions. It should be acknowledged, however, that as Blacks gained the right to vote and were able to elect representatives of their choice to office, there was greater justification for the federal courts backing away. There is a strong argument to be made that the Court backed off too quickly starting in the 1970s, overestimating Blacks' ability to obtain equal educational opportunities through ordinary political processes like local school boards, state legislatures, and Congress. This is particularly true if we take into account vote-diluting practices that persisted long after Blacks enjoyed the formal right to vote, and undoubtedly weakened their ability to pursue educational

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[37] *Parents Involved*, 127 S. Ct. 2738, 2801 (2007) (Breyer, J., dissenting) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)); *see also* N.C. Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) (noting school authorities' "wide discretion in formulating school policy," in the exercise of which they "may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements").

[38] 418 U.S. 717, 719–20 (1974).

[39] *Id.* at 741.

[40] *Id.* at 743–44. For a discussion of the constitutional dimension of *Milliken*'s "professed respect for local control," see David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 568–69 (1999).

equality opportunities through local school boards, state legislatures, and Congress.[41] My point is not that the Court was correct to retreat from aggressive superintendence of desegregation efforts in *Milliken* and cases that followed.[42] It is simply that, as African Americans' political power increased—and with it their ability to protect their interests through democratically elected bodies—the weight of the arguments for overriding the decisions of state and local political bodies decreased.

Taken together, the implication of these cases is that the ordinary processes of state and local government could be trusted to weigh the competing values at stake in the desegregation debate, so long as they remained open to all comers. As those bodies became more representative of the communities that they served, by virtue of the greater protection afforded the voting rights of minorities, the argument for withdrawing judicial oversight became more persuasive.

II. DISCRIMINATION

If *Brown* and the desegregation cases that followed it were the only relevant precedents, then the Court's decision in *Parents Involved* would have been an easy one. With their emphasis on deference to democratically elected bodies, the desegregation cases support the conclusion that the school boards in Louisville and Seattle should have been afforded latitude in balancing the competing values at play in the debate over race-conscious remedies for de facto segregation.

There was no persuasive argument for a federal court invalidating the plans in Louisville and Seattle based on defects in the political process through which these policies were enacted and retained. The Seattle and Louisville plans, after all, were the product of fairly elected school boards that were open to all comers—both in the selection of their members and in their deliberations. There was, moreover, no plausible claim that a disfavored minority was shut out of the process. That was especially true given that Whites constitute a majority of citizens in Jefferson County, Kentucky, and a plurality in Seattle. [43] Although opponents of

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[41] *See* Davidson, *supra* note 26, at 24–27; Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 922 (1998); John C. Ruoff & Herbert E. Buhl, *Voting Rights in South Carolina: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 643, 705 (2008).

[42] *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991); Missouri v. Jenkins, 515 U.S. 70 (1995).

[43] *See* Robert S. Chang & Catherine E. Smith, *John Calmore's America*, 86 N.C. L. REV. 739, 744 n.18 (2008); Tal Klement & Elizabeth Siggins, *A Window of*

race-conscious integration efforts lost their battle in both places, they had no claim that they were denied fair and equal access to their school boards. Nor was there evidence upon which one could argue that the democratic processes of these groups were distorted by prejudice, so as to deny White students (or anyone else opposing the districts' desegregation policies) a fair shake. As a matter of process-based theory, then, the decision is indefensible.

Of course, there *is* a line of case authority that provides strong precedential support for the decision in *Parents Involved.* That is the line of discrimination cases from *Bakke* to *Croson* to *Grutter* and *Gratz*, which hold that race-conscious affirmative action programs are presumptively unconstitutional under the Equal Protection Clause.[44] *Parents Involved* thus presents a collision between the desegregation cases' emphasis on local control, and the affirmative action cases' emphasis on raceblindness as an end in itself.

Before exploring the democratic deficiency in *Parents Involved*, it is first helpful to set forth the precedent-based argument for striking down the Louisville and Seattle plans. If we put aside the post-*Brown* desegregation cases, as well as any concerns about the Court overriding decisions of democratically elected bodies, that argument is actually quite straightforward.[45] It goes something like this:

1.) Under established precedent, all racial classifications are subject to strict scrutiny.[46] That is true regardless of whether the law or practice in question is deemed inclusive or exclusive, and regardless of whether its alleged purposes are invidious or benign.[47] There is no dispute that both the Seattle and Louisville plans took race into consideration in making student

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[44] Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Gratz v. Bollinger, 539 U.S. 244, 270 (2003); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491–95 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

[45] For this point, I can cite personal experience. At the start of this symposium, the *Ohio State Law Journal* staged a re-creation of the oral argument in *Parents Involved*, with a student and a professor assigned to argue each side. I was one of the participants in this moot court, assigned to argue Petitioners' side—undoubtedly the easier one, in light of the precedent discussed in the footnotes that follow.

[46] *See* Johnson v. California, 543 U.S. 499, 505–06 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[47] *See Johnson*, 543 U.S. at 505; *Grutter*, 539 U.S. at 326; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. at 500.

assignments.[48] They are therefore racial classifications and may be upheld only if narrowly tailored to a compelling interest.

2.) The Supreme Court has never held racial balancing alone to be a compelling interest under strict scrutiny, but instead has only sustained "diversity" as a rationale when part of an overall plan to increase student diversity—including but not limited to racial diversity—in higher education.[49] That is not the case with respect to either district's plan, which only seeks to achieve racial diversity, not some broader goal of diversity that goes beyond race.

3.) Even assuming that there is a compelling interest in achieving a racial balance within the schools, neither plan is narrowly tailored to this end. Seattle's plan crudely separates students into two groups, White and non-White, and then assigns a preference until schools are within a fixed numerical range.[50] Louisville's plan categorizes students as Black or not Black, and requires non-magnet schools to maintain an enrollment between fifteen and fifty percent Black, with the exact criteria for assigning students otherwise ill-defined.[51] Both programs lack the individualized treatment that was the hallmark of the affirmative action program upheld in *Grutter*,[52] which distinguished that program from the one struck down in *Gratz*.[53] Neither school district, moreover, has adequately considered race-neutral means by which to achieve the same end. Accordingly, they are not narrowly tailored, even conceding a compelling interest.

"QED," as Justice Scalia might say.[54] For opponents of race-conscious government action, this is shooting fish in a barrel. This is more or less the line of reasoning that was adopted in the portions of Chief Justice Roberts's opinion that speak for a majority[55] and Justice Kennedy's concurring opinion.[56]

The problem with this analysis is that it takes no account of the proper role of federal courts with respect to democracy. There is no attempt to justify judicial intervention on anything that might even generously be

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[48] *Parents Involved*, 127 S. Ct. 2738, 2790–91 (2007) (Kennedy, J., concurring).

[49] *See Grutter*, 539 U.S. at 337.

[50] *Parents Involved*, 127 S. Ct. at 2790–91 (Kennedy, J., concurring).

[51] *Id.* at 2789–90.

[52] 539 U.S. at 337.

[53] *Id.*

[54] Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).

[55] *Parents Involved*, 127 S. Ct. at 2751–54, 2759–67.

[56] *Id.* at 2788–97 (Kennedy, J., concurring). The portions of the Chief Justice's opinion that speak only for a plurality of four Justices sweep more broadly, as explained below.

termed a theory of the proper role of the federal courts with respect to the political process. Missing from the majority justices' opinions is any conception of when the political branches of government can be trusted and when they cannot be. To be sure, the Court *does* have a clear and consistent theory of discrimination: namely, that it encompasses all forms of race-based differentiation, however well intentioned. But the Court has no theory of democracy.[57] While none of this is news to those who have followed the Court's affirmative action cases over the last three decades, the *Parents Involved* decision represents the most egregious example of this failure, given its overruling of decisions made by locally elected school boards that were perfectly capable of considering—and in fact *did* consider—the very arguments successfully pressed by plaintiffs in both cases. To see what the Court misses, it is useful to examine portions of each of the three opinions written by Justices in the majority.

I start with the note on which Chief Justice Roberts ends his opinion, contained in a portion that speaks only for a plurality of justices: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[58] The handiwork of a gifted lawyer, who can easily be imagined using this as his closing line had he argued the case for Petitioners, this rhetorical flourish will surely resonate with many readers and is likely to be the most enduring sentence from the opinion. One prominent and eloquent defender of the plurality opinion, Judge Harvie Wilkinson, finds "ringing clarity" in this assertion.[59] But this seemingly unanswerable line occludes more than it clarifies.

The Chief Justice is using the word variants on "discrimination" to mean two very different things. In the first clause of the sentence, the word "discrimination" is used to refer to the districts' stated objectives. These objectives, however, are less accurately described as "stop[ping] discrimination" than as providing a racially integrated—or, as the plurality would prefer to characterize it, "racially balanced"[60]—learning environment for public school students. Among the ultimate goals of such an environment is to fulfill *Brown*'s promise—as understood by many people—of dismantling our persistent racial caste system and thereby serving the

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[57] This observation has caused one election law scholar to respond, "and be thankful for small favors." *See* Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 283 (David K. Ryden ed., 2d ed. 2002).

[58] 127 S. Ct. at 2768.

[59] J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 161 (2007).

[60] *See, e.g.*, 127 S. Ct. at 2752 n.10, 2780 & 2789.

principle of anti-subordination.[61] To be sure, this system of racial subordination is the product of the long history of discrimination, a fact that the plurality elides.[62] Still, the Chief Justice's characterization of the districts' objectives is imprecise at best and inaccurate at worst. A better statement of the districts' objectives would have been "to provide a racially integrated learning environment," rather than "to stop discrimination on the basis of race."

The Chief Justice's second mention of discrimination in the sentence is more accurate, at least in terms of its consistency with case law. The plurality would require school districts to "stop discriminating on the basis of race," by which it means "stop making distinctions based on race." This is consistent with precedent, in that the Court has long defined discrimination to mean, or at least to include, any and all differentiations based on race—whether driven by a desire to subordinate a minority group or by a desire to remedy the effects of past and present racial inequalities.[63] At least since *Croson*, a majority of Justices have taken the position that such racial differentiation is subject to strict scrutiny.[64] The last half of Chief Justice Roberts's sentence, then, is an affirmation that anti-differentiation is the be all and end all of equal protection.[65] If there is ringing clarity in his line, it is on this point. It is an unmistakable dig at the idea of anti-subordination as an equal protection principle.

The familiar conflict between these principles, discussed by too many commentators to name, is not one that is necessary or possible to resolve here. This deeply rooted conflict is latent in the first Justice Harlan's memorable statement in *Plessy v. Ferguson*, invoked in the opinions of the Chief Justice,[66] Justice Thomas,[67] and Justice Kennedy[68]: "Our

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[61] *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

[62] To his credit, Judge Wilkinson laments the fact that the plurality fails to acknowledge the "tragic elements of the African American experience in this country." Wilkinson, *supra* note 59, at 162.

[63] Chang & Smith, *supra* note 44, at 752; Philip C. Aka, *The Supreme Court and Affirmative Action, With Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L.J. 1, 74–81 (2006).

[64] *See Croson*, 488 U.S. at 493 (plurality opinion), 520 (Scalia, J., concurring).

[65] For discussion of the anti-subordination and anti-differentiation theories of equality, see Colker, *supra* note 61, at 1005–07. *See also* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2422–23 (2003) (contrasting colorblindness and anti-subordination schools of equal protection thought).

[66] *Parents Involved*, 127 S. Ct. at 2758 n.14.

[67] *Id.* at 2782 (Thomas, J., concurring).

Constitution is color-blind, and neither knows nor tolerates classes among citizens.[69] Advocates of the anti-differentiation principle place their emphasis on the first half of the sentence, understanding Justice Harlan to endorse the view that the Equal Protection Clause commands raceblindness.[70] They are less likely to focus on the second half of this sentence, saying that the Constitution "neither knows nor tolerates classes among citizens." This may be understood as an endorsement of the anti-subordination principle. The Equal Protection Clause may be understood as commanding the eradication of all practices that perpetuate racial subordination. Those who supported the Seattle and Louisville plans would surely view their programs as designed to serve that end. At the time that Justice Harlan wrote this dissent, of course, it was not necessary to choose between the two competing principles implicit in his sentence. Written during the ascendancy of Jim Crow, the principles of anti-differentiation and anti-subordination were in sync. Race-based differentiation on Louisiana railway cars perpetuated the racial caste system; accordingly, eliminating that differentiation would have served the principle of anti-subordination. At a time when most southern Blacks had lost the voting rights that they had gained during Reconstruction, the arguments for judicial intervention were overwhelming. Blacks in Louisiana and elsewhere could not protect their interests through the political process.

Parents Involved, unlike *Plessy*, presents a conflict between the anti-differentiation and anti-subordination principles—one that the Chief Justice's artful use of the term "discrimination" suggests without directly confronting. The question of interest to me here, however, is not which side has the better of this argument. The real question is *why this conflict should ultimately be resolved by the federal courts*, rather than by political institutions like school boards, state legislatures, or Congress.

One searches the *Parents Involved* opinions in vain for a compelling answer to this question. In fact, the opinions of the Chief Justice, Justice Thomas, and Justice Kennedy all strive mightily to avoid it. In response to Justice Breyer's concern that the Court demonstrates a lack of "respect for democratic local decisionmaking by States and school boards,"[71] the plurality chastises him for relying on "dicta" from *Swann*.[72]

This misses the force of Justice Breyer's point. As explained in Part I,

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[68] *Id.* at 2791 (Kennedy, J., concurring).

[69] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[70] *See, e.g.*, 127 S. Ct. at 2782–83 (Thomas, J., concurring); *id.* at 2791 (Kennedy, J., concurring).

[71] *Id.* at 2835–36 (Breyer, J., dissenting).

[72] *Id.* at 2762 (Roberts, J., plurality opinion).

the post-*Brown* cases' emphasis on local control over school districts is best understood as rooted in a conception of democracy and the proper role of the courts in sustaining and constraining it. This is evident not just in *Swann*, but also in later cases that limit desegregation remedies.[73] In dismissing Justice Breyer's point with a wave of the hand, the plurality elides the conception of democracy underlying *Brown* and later desegregation cases.

Justice Thomas's opinion contains the most forceful answer to the question of why the Court thinks itself most fit to resolve the conflict in values between the anti-subordination and anti-differentiation camps. His opinion expresses the unequivocal conviction that racial differentiation is inherently noxious and thus prohibited by the Equal Protection Clause.[74] This is best characterized as a "conviction," because it is not supported by the Fourteenth Amendment's text, post-enactment history, or evidence. The text of the Constitution mandates equal protection, not raceblindness. Something more is therefore required to support the conclusion that it means equal protection should be interpreted to mean raceblindness and nothing else. Historical developments after the ratification of the Fourteenth Amendment provide scant support, given that race-conscious programs for African Americans were not just tolerated but adopted by Congress.[75] Nor is there contemporary evidence for the conclusion that all racial differentiation is noxious. Justice Thomas would apparently demand uncontroverted social science evidence that racial balancing serves the interests of Black students in order to sustain it.[76] Yet he—and, for that matter, all of the Justices in the majority—demands no such evidence in support of those who claim that racial differentiation is inherently harmful. Missing are the studies establishing that plans like those adopted in Seattle or Louisville are harmful to students, whether Black, White, Asian, or Latino. His conviction that race-conscious programs are odious is just that: a

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[73] *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991); Missouri v. Jenkins, 515 U.S. 70 (1995).

[74] To accept this characterization, one must put aside that Justice Thomas was willing to put aside his general revulsion to any and all race differentiation when considering a challenge to racial segregation in California prisons. Johnson v. California, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting). In that case, he and Justice Scalia departed from strict scrutiny and applied a more deferential standard. *Id.*

[75] *See* Klarman, *supra* note 11, at 822; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754, 784–85 (1985).

[76] 127 S. Ct. at 2776 (noting that "[s]cholars have differing opinions as to whether educational benefits arise from racial balancing") (Thomas, J., concurring).

conviction and nothing more.

To his credit, Justice Thomas at least acknowledges the dissent's point that it should be left to democratically elected institutions to evaluate the social science evidence and determine whether the benefits of race-conscious integration outweigh the harms.[77] His response is simply that the decision of what the Fourteenth Amendment commands is for the Court to decide, not elected officials: "[I]t would leave our equal-protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists."[78] This makes perfect sense, if one shares the conviction that equal protection can mean nothing other than raceblindness, period. It makes less sense if one understands there to be conflicting equality values at stake. From this perspective, the question that Justice Thomas's contention begs is why reconciliation of competing equality norms should be left to the mercy of unelected judges, in the face of admittedly conflicting evidence regarding the benefits of race-conscious integration plans.

Toward the end of his opinion, Justice Thomas lambasts policies that promote racial integration as the product of "faddish social theories" (one can only wonder whether he has Kenneth Clark's doll experiments cited in *Brown*[79] in mind) and cautions us to "beware of elites bearing racial theories."[80] The latter remark is particularly inexplicable when one recalls that the Seattle and Louisville plans were chosen not by "elites" but by local school boards. This accusation of elitism recalls *Romer v. Evans*, in which Justice Thomas joined Justice Scalia's dissenting opinion which asserted that: "This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality is evil."[81] It also recalls the abortion cases, in which Justice Thomas similarly views the Court's Justices as substituting their own policy preferences for those of democratically elected bodies.[82] Whatever currency

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[77] *Id.* at 2778.

[78] *Id.*

[79] 347 U.S. 483, 495 n.11 (1954). For further discussion of Clark's doll experiments and the *Brown* Court's reliance on them, see RICHARD KLUGER, SIMPLE JUSTICE 315–29, 705–06 (1975).

[80] 127 S. Ct. at 2787 (Thomas, J., concurring).

[81] 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (citation omitted).

[82] This calls to mind Justice Scalia's dissent in *Planned Parenthood v. Casey*, in which Justice Thomas joined, which concluded:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the

railing at elites may have in the context of gay rights or abortion, it is completely out of place in *Parents Involved*. It is the Court, after all, that overrides the balancing of competing values chosen by democratically elected decisionmakers, based upon the majority Justices' conviction that racial differentiation is inherently noxious.

Justice Kennedy's opinion strikes the most moderate tone of the majority Justices.[83] For the most part, it fairly applies the "narrow tailoring" prong of strict scrutiny, in keeping with the precedent-based argument that I described earlier. In particular, his analysis hones in on a defect in each of the plans considered, judged from the standpoint of strict scrutiny. The Louisville plan, he concludes, is too "broad and imprecise [to] withstand strict scrutiny" given the lack of clarity as to how and when race was being employed.[84] One may disagree with this characterization, as Justice Breyer does,[85] while still acknowledging that a lack of precise standards necessarily gives officials discretion that may sometimes allow racial bias to enter in.[86] As for Seattle's plan, Justice Kennedy describes the defect as its "crude racial categories" of White and non-White, in a district with substantial White, African American, Asian-American, and Latino populations.[87] It is no great stretch to find that such a plan flunks the narrow tailoring standard, as articulated in prior cases.[88] In reaching this conclusion, Justice Kennedy demonstrates a greater sensitivity than the other majority Justices to the interests that the districts seek to serve, while taking the view that race-conscious mechanisms should only be used as the "last resort."[89] But in the end, his opinion also rests on the belief that racial distinctions are "pernicious,"[90] without explaining why this judgment—and the weighing of

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imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

505 U.S. 833, 1002 (1992).

[83] For a discussion of the roots of Justice Kennedy's seemingly more moderate views on race in *Parents Involved*, see Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

[84] 127 S. Ct. at 2789–90 (Kennedy, J., concurring).

[85] *Id.* at 2820–30 (Breyer, J., dissenting) (concluding that plans satisfy strict scrutiny).

[86] *See* Tokaji, *First Amendment Equal Protection*, *supra* note 65, at 2453.

[87] 127 S. Ct. at 2790.

[88] *See Croson*, 488 U.S. at 506 (finding fault with Richmond's contracting preference for Spanish-speaking, Oriental, Indian, Eskimo, and Aleut persons when there was no evidence of past discrimination against these groups).

[89] 127 S. Ct. at 2792 (Kennedy, J., concurring).

[90] *Id.* at 2796.

any harms against the benefits of race-conscious action—should be made by the federal courts rather than elected school boards.

At bottom, then, all three of the majority Justices' opinions rest on a conviction that racial distinctions are noxious. There is undeniable precedential support for the equation *differentiation = discrimination = (presumptive) constitutional violation.* The question that all the majority opinions avoid is why the competing visions of racial equality are better resolved by the federal courts than by democratically elected bodies in Seattle, Louisville, and elsewhere. Though grounded in affirmative action precedents, the majority's conclusion is unmoored in any coherent conception of the federal judiciary's proper role in a democracy.

III. DEMOCRACY

What might a coherent understanding of the federal courts' proper role in a democracy look like? Though I will not attempt a comprehensive answer to this question in this Essay, it would at least entail an explanation of the circumstances in which elected bodies can and cannot be trusted. It would focus on both the inputs and the outputs of the democratic process. By inputs, I mean to include barriers to participation, representation, or governance. These could include anti-competitive redistricting practices or campaign funding rules.[91] It might take into consideration barriers to pluralistic bargaining, such as bias against groups defined by race or sexual orientation, that distort the ordinary political process. To the extent that there are defects in the inputs of the democratic process, related outputs of that process—the laws or policies enacted by elected bodies affecting these groups—would warrant closer scrutiny.

The ingredients of fair process sketched out in the preceding paragraph are undeniably value-laden and deeply contestable. My point here is not to argue for or against any particular conception of a fair democratic process. It is not, for example, to argue that the Court should engage in searching review of campaign finance regulations that disadvantage challengers,[92] alleged partisan gerrymanders,[93] or voter identification laws that may

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[91] *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649 (1998) (suggesting that courts should "destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation").

[92] *See* Randall v. Sorrell, 548 U.S. 230, 231–34 (2006) (striking down Vermont's contribution limits, partly on the ground that they inhibit challengers and therefore stymie electoral competition).

[93] *See* LULAC v. Perry, 548 U.S. 399, 403 (2006) (declining to hold Texas's mid-decade redistricting an unconstitutional partisan gerrymander).

exclude eligible voters.[94] It is instead to suggest that questions about the fairness of the democratic process ought to be central in determining how closely to scrutinize the products of that process. Where certain individuals or groups are prevented from participating as equals, the argument for judicial intervention is stronger.

In addition to the cases described in Part I, the significance of the availability of democratic channels for securing educational equality is evident in two cases that protected desegregation efforts. The first is Justice Rehnquist's in-chambers opinion in *Bustop, Inc. v. Board of Education of City of Los Angeles*, in which he rejected a request to stay a state court order requiring the race-conscious reassignment of some 60,000 students in the Los Angeles Unified School District.[95] Justice Rehnquist's brief opinion rejects the "novel" argument that there was a federal right to be free from race-conscious student assignments, remarking: "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action."[96] There was no need for federal judicial intervention, because in this circumstance, California's democratic processes could be trusted. To be sure, the desegregation remedy in *Bustop* was issued by a state court enforcing state law, rather than being voluntarily adopted by a local school board.[97] The implication, however, is that state and local political processes could be trusted, obviating the need for federal judicial intervention. If the people of California disliked the interpretation given to state law by the state's supreme court, then they were free to amend that law.[98] That is in fact what happened. The postscript to *Bustop* is that the voters of California ultimately did choose to change the requirements of California's constitution, so as to limit the circumstances under which race-conscious desegregation remedies were required.[99]

The other opinion emphasizing respect for the ability of democratically elected bodies to choose desegregation remedies is *Washington v. Seattle School District, No. 1*, in which the Court struck down a Washington initiative that effectively barred democratically elected bodies from adopting

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[94] *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1615 (2008) (upholding Indiana law requiring photo identification to vote).

[95] 439 U.S. 1380, 1380 (1978).

[96] *Id.* at 1383.

[97] *Id.* at 1380.

[98] CAL. CONST. art. 1, § 7.

[99] The Supreme Court upheld this initiative constitutional amendment in *Crawford v. Bd. of Educ.*, 458 U.S. 527, 545 (1982).

race-conscious busing for the purpose of addressing *de facto* segregation.[100] This initiative was enacted in response to a voluntary desegregation program adopted in Seattle, by the same school district from which *Parents Involved* would later emerge.[101] The district challenged the initiative, and the Court concluded that the state's initiative unlawfully burdened racial minorities' access to the political process.[102] After Washington's initiative, Blacks seeking desegregative busing—alone among all constituents of local school boards—were prevented from going to their elected representatives to seek beneficial legislation.[103] The Court found this imposition on local control unconstitutional, because it restricted a particular racial group's access to the political process.[104] What the Court found most dispositive in *Washington v. Seattle School District, No. 1*, was that the state initiative distorted the ordinary political process, preventing those favoring desegregation from going to their local school boards seeking a remedy.[105]

At first glance, *Bustop* and *Washington v. Seattle School District* may seem to cut in opposite directions. While *Bustop* affirms a state's authority over subordinate local entities, *Washington* holds that there are limits upon a state's ability to dictate to those local entities.[106] At the heart of both these cases, however, is a respect for *fair* democratic processes through which appropriate remedies for de facto segregation might be selected and implemented.[107] Where those processes are equally open to all comers, as in *Bustop*, there is less reason for federal judicial intervention. But where those processes are constricted, so as to shut governmental doors to certain claims for relief, as in *Washington v. Seattle School District, No. 1,* there is a

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[100] 458 U.S. 457, 470 (1982).

[101] *Id.* at 460–61.

[102] *Id.* at 470.

[103] *Id.* at 462–64.

[104] *Id.* at 470.

[105] This was the key distinction between this case and *Crawford*, decided the same day. The California initiative upheld in *Crawford* did not restrict anyone's access to the ordinary political process; it only limited the remedies that courts could issue under the state constitution. *See* Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129, 136 (1999). By contrast, under the initiative struck down in *Washington v. Seattle School District*, those seeking remedies for de facto segregation could no longer approach their local school boards seeking a remedy.

[106] *See id.* at 135–37; Barron, *supra* note 42, at 569–71.

[107] In referring to "fair" political processes, I mean to exclude the extraordinary process that racial minorities were forced to undergo in order to achieve beneficial legislation, under the initiative struck down in *Washington v. Seattle School District.*

compelling argument for federal judicial intervention.

What is striking about *Parents Involved* is the complete failure of the majority Justices to ask such questions. This failure is deeply rooted in the Supreme Court's discrimination cases. In its cases regarding race-conscious government action, the last serious effort at a process-based explanation for heightened scrutiny appears in *Croson*.[108] Writing for a plurality, Justice O'Connor partly justified the Court's decision to apply strict scrutiny to Richmond's affirmative action program on the ground that Blacks constituted half of that city's population:

> Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).
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> In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by Blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Discrimination, 41 U. Chi. L. Rev. 723, 739 n. 58 (1974).[109]

By the time of *Adarand*, however, this rationale for heightened scrutiny had disappeared. The Court applied strict scrutiny to a federal race-conscious affirmative action program, despite the fact that it benefitted numerical minorities while burdening the White majority.[110] The Court

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[108] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[109] *Id.* at 495–496.

[110] 515 U.S. 200, 227 & 235 (1995). *See* Brian Boynton, Democracy and Distrust *After Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 439 (2000) ("The outcome in *Croson* is consistent with Ely's position because, under his theory, laws benefiting the class of people to which the people who wrote them belong are suspect. *Adarand*, however, is a different story entirely.").

likewise applied strict scrutiny in *Grutter*[111] and *Gratz*,[112] without pausing to consider the ability of the burdened group to protect its interests through the political process.

In this respect, the affirmative action cases may be distinguished from the "racial gerrymandering" cases starting with *Shaw v. Reno*. Although *Shaw* and its progeny do rely in part on the raceblindness principle articulated in *Bakke* and its progeny, the *Shaw* Court was also partly motivated by its concern with the U.S. Department of Justice's use of its preclearance power to compel the creation of majority-minority districts.[113] The Court's motivation became even more clear in *Miller v. Johnson*, in which the Court more explicitly took aim at the Justice Department's policy of requiring the "maximization" of majority-minority districts.[114] Whether or not one agrees with the Court's characterization or criticism of the Justice Department, there can be no mistaking the fact that *Shaw* and its progeny are driven in part by a distrust of the executive branch's institutional capacity to exercise its preclearance power evenhandedly.[115] That is not to say that *Shaw* or the cases that followed were correctly decided; only that there was a conception of democratic politics, and the Court's proper role in policing it, embedded in these decisions.

In contrast, the Court's affirmative action decisions since *Croson* demonstrate little regard for whether democratic institutions may be trusted to make these decisions. Absent a change in personnel, the Court's basic approach in these cases seems unlikely to change. What does this mean for those interested in promoting integrated public schools and, more broadly, equal educational opportunities? The best for which advocates of progressive educational reform can reasonably hope from the federal courts is that they will stay out. It is democratic institutions of local, state, and

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[111] 539 U.S. 306, 326 (2003).

[112] 539 U.S. 244, 270 (2003).

[113] Shaw v. Reno, 509 U.S. 630 (1993). *See* Tokaji, *The Story of* Shaw v. Reno, *supra* note 25, at 521–22.

[114] 515 U.S. 900, 921–27 (1995).

[115] *See* Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Preclearance*, 49 HOW. L.J. 785, 803 (2006). One explanation for this distrust is that, during the presidency of George H.W. Bush, "[p]olitical appointees within the Justice Department were delighted to pack pro-Democratic minority voters into new majority-minority districts, thereby drawing them away from the electoral strength of Democratic incuments." SAMUEL ISSACHAROFF, ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 908 (2d ed. 2001); *see also* Tokaji, 49 HOW. L.J. at 801–04 (discussing allegations of partisan manipulation of the Justice Department's preclearance power in the 1990s, and the Court's reaction to it in the *Shaw* line of cases).

federal government that provide the most promising avenues for reform.

One possibility is to pursue federal legislation that would promote integrated public schools.[116] Through the use of its Spending Clause power, Congress might try to create incentives for local and state authorities to promote integrated learning environments. While *Parents Involved* surely makes this more difficult, Justice Kennedy's opinion suggests several race-neutral possibilities and leaves the door open (if only slightly) to race-conscious programs if those are unavailing.[117] Local boards are sure to be wary of adopting programs that would invite litigation, but Congress could help by adopting a carrot-and-stick approach. The carrot would be a cooperative federal-state-local relationship, through which Congress would provide funding and assistance as an incentive to cash-strapped districts that would like to integrate their schools while minimizing the risks of liability. It might further provide guidance or even legal assistance to jurisdictions that want to alleviate racially isolated schools.

A possible stick is to strengthen Title VI of the Civil Rights Act of 1964,[118] by providing a cause of action for students in districts with racially isolated schools. As long as such a claim is tied to a district's receipt of federal funds, and does not require it to adopt plans that violate the Constitution, such legislation is likely to be upheld. Another potential amendment to Title VI is to prohibit states from giving effect to laws like California's Proposition 209 and Michigan's Proposal 2 that impose state constitutional bans on race-based "preferential treatment."[119] These laws have clauses providing that they should not be interpreted to require action that is necessary to maintain federal funds.[120] Were Congress to pass legislation prohibiting states from giving effect to these laws as a condition of receiving federal funds, it could effectively preempt measures banning race-conscious decision-making in public or higher education.

These possibilities are merely intended as suggestive. The key point is that the Court's decision in *Parents Involved* will force advocates for equal educational opportunity to think creatively. If the federal courts were once viewed as saviors and elected officials as barriers to educational reform, those roles have now flipped. Hope for integrated learning environments and equal educational equalities, at least for the foreseeable future, lies primarily in democratic politics.

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[116] Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. PITT. L. REV. 175, 212 n.183 (2005).

[117] 127 S. Ct. at 2792–93, 2796 (Kennedy, J., concurring).

[118] 42 U.S.C. §§ 2000d et seq.

[119] CAL. CONST. art. I, § 31(a); MICH. CONST. art. I, § 26(1).

[120] *See* CAL. CONST. art. I, § 31(e); MICH. CONST. art. I, § 26(4).

IV. CONCLUSION

Justice Jackson was right. Decisions about whether to override the decisions of elected officials should depend, at least in part, on an assessment of whether there has been some failure in representative democracy. This does not mean that "it is the majority who will determine what the constitutional rights of the majority are," as Justice Jackson's then-law clerk William Rehnquist wrote.[121] There unquestionably *had* been a failure of democracy in the decades that preceded *Brown*, and the denial and dilution of African Americans' voting rights for years afterwards justified the Court's ongoing intervention. By contrast, there is no arguable democratic failure that should cause courts to look with suspicion on the policies that emerged from the Seattle and Louisville school boards. The Court's failure to justify its intervention on democratic grounds is rooted in its discrimination cases since *Croson* and has become a fixture of the Court's approach to race-conscious programs, whatever their motivation. We can only hope that the fate that the young William Rehnquist quite wrongly predicted for *Brown* will befall *Parents Involved* and the line of cases on which it rests: that they will "fade in time . . . as embodying only the sentiments of a transient majority of nine men [and women]."[122]

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[121] Memorandum from William H. Rehnquist to Justice Robert Jackson, *A Random Thought on the Segregation Cases* (1952), *reprinted in* 117 CONG. REC. 45,440–45.

[122] *Id. See Snyder, supra* note 1, at 879.